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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

*Ex Parte*

The Honorable Michael K. Powell  
Chairman  
Federal Communications Commission  
415 - 12th Street, SW, Room 8 B201  
Washington, D.C. 20554

The Honorable Kevin J. Martin  
Commissioner  
Federal Communications Commission  
445 - 12th Street, SW, Room 8 A204  
Washington, D.C. 20554

The Honorable Kathleen Q. Abernathy  
Commissioner  
Federal Communications Commission  
445 - 12th Street, SW, Room X B115  
Washington, D.C. 20554

The Honorable Jonathan S. Adelstein  
Commissioner  
Federal Communications Commission  
445 - 12th Street, SW, Room 8 C302  
Washington, D.C. 20554

The Honorable Michael J. Copps  
Commissioner  
Federal Communications Commission  
445 - 12th Street, SW, Room 8 A302  
Washington, D.C. 20554

Re: CC Docket Nos. 01-338, 96-98 and 98-147

Dear Commissioners:

Americatel Corporation ("Americatel")<sup>1</sup> urges the Federal Communications Commission ("FCC" or "Commission") to retain local switching as an available unbundled

<sup>1</sup> Americatel, a Delaware corporation that is a subsidiary of ENTEL Chile, is a common carrier providing domestic and international telecommunications services. ENTEL Chile is the largest provider of long distance services in Chile. Americatel also operates as an Internet Service Provider ("ISP"). Americatel specializes in serving Hispanic communities throughout the United States, offering presubscribed (1+), dial-around, and prepaid long distance services, as well as private line and other high-speed services to its business customers. Americatel does not, at the present time, provide any local services to its customers.

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network element ("UNE"). Additionally, the Commission should maintain a telecommunications carrier's ability to combine the local switching UNE ("UNE Switching") with other UNEs, as unbundled network element platforms ("UNE-Ps"). As *Americatel* demonstrates herein, any decision by the FCC to foreclose all access to UNE Switching (or any other UNE, for that matter) on a nationwide basis would violate the specific language of Section 251(d)(2) of the Communications Act of 1934, as amended ("Act").<sup>2</sup> While the Commission may have legal authority to establish a national list of UNEs in the FCC's rules, the Commission is clearly not authorized by the statute to use the rulemaking process to eliminate all access to a specific UNE.

According to the plain language of Section 251(d)(2), each and every telecommunications carrier, including future entrants to the market, has the statutory right to demonstrate that, based on its own facts and circumstances, the carrier's inability to obtain access to a requested UNE, which is necessary to provide service, would impair the carrier's ability to provide service to customers. Under the very terms of the statute, which focuses directly on "the ability of the telecommunications carrier seeking access to [the UNE or UNEs in question]", the FCC cannot use the rulemaking process to declare that access to UNE Switching need not be provided by an incumbent local exchange carrier ("ILEC") to any competitive carrier under any circumstances. Congress clearly directed the FCC to ensure that every competitive carrier would have a right to demonstrate that its specific request for access to a particular UNE satisfies the "necessary" and "impair" tests in a given location. This is true even when requests for the very same UNE from other carriers operating in the same market might not pass those tests, or even when the same requesting carrier's application for the identical UNE in another geographic market may not be found to satisfy the "necessary" and "impair" requirements. Section 251(d)(2) of the Act demands that the Commission retain a method whereby a telecommunications carrier has access to any network element for which access thereto is technically feasible, so long as the "necessary" and "impair" tests are satisfied.

As noted above, *Americatel* does not, at the present time, provide any local services; nor has it sought certification as a result of a competitive local exchange carrier ("CLEC") in any state. However, as market conditions change the entry of the former Bell Operating Companies ("BOCs") into interLATA markets, which, in turn, has enabled these behemoths to offer customers telecommunications services bundled on a "soup-to-nuts" basis.

<sup>2</sup> 47 U.S.C. §251(d)(2).

<sup>3</sup> *But see U.S. Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*") (remanding the FCC's UNE rules of nationwide applicability because of the Commission's failure to consider the "necessary" and "impair" standards of the Act adequately in light of many differences in individual markets around the country).

Americatel's market plans might well also change. Americatel remains committed to offering its customer base the U.S. Hispanic market—high-quality services at attractive prices, under terms and conditions that meet market demand. Market forces continually require Americatel to reevaluate its service offerings. Given these dynamic market realities, it is foreseeable that Americatel might elect at some point to enter the local exchange market in certain geographic areas of the country.

The U.S. Hispanic market is both rapidly growing and complex in nature. U.S. Census data indicate that the number of Hispanics—an ethnic, rather than racial categorization—in the United States increased by more than 57% from 1990 to 2000.<sup>4</sup> While there are several states with very high concentrations of Hispanic people, Hispanics are located in significant numbers throughout most of the U.S. For example, according to 2000 Census figures, Hispanics exceed 2.5% of the population in 35 of the 50 states.<sup>5</sup> In sum, there are sizable Hispanic communities scattered throughout the United States. The provision of local service to these (or to a portion of these) diverse communities would likely require a complex business strategy by Americatel or any other CLEC that was concentrating on this large market segment. It is quite possible that this strategy might require not only the deployment of facilities in some locations, but also access to UNE-Ps in other locations.

Were Americatel to decide that local market entry was appropriate in the future, it should be permitted to exercise its rights granted pursuant to Section 251(d)(2) of the Act to have access to all technically feasible UNEs—not just the UNEs set forth in the Commission's then-effective rules. Rather, Americatel, in the event of local market entry, must be afforded its statutory rights to obtain from any incumbent local exchange carrier ("ILEC")<sup>6</sup> access to "network elements on an unbundled basis at any technically feasible point," according to the dictates of Section 251(c)(2) of the Act. Americatel or any other future market entrant must be afforded the right to demonstrate that a particular UNE—whether listed in the FCC's rules or not—meets the "necessary" and "impair" standards of Section 251(d)(2) of the Act. Hence, as a

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<sup>4</sup> U.S. Census Bureau, "Population by Race and Hispanic or Latino Origin for the United States: 1990 and 2000 (PHC-T-1)," Table 1 (available online at <http://www.census.gov/population/www/cen2000/phc-t1.html>.)

<sup>5</sup> U.S. Census Bureau, "Population by Race and Hispanic or Latino Origin for the United States, Regions, Divisions, States, Puerto Rico, and Places of 100,000 or More Population," Table 1 (available online at <http://www.census.gov/population/www/cen2000/phc-t6.html>.)

<sup>6</sup> This would, of course, exclude any ILEC that is also a rural telephone company and that has an exemption or other dispensation from some or all of the requirements of Section 251 of the Act. See 47 U.S.C. §251(f).

matter of law, the Commission may not write or amend its UNE rules to preclude any CLEC—now or 50 years from now—from gaining access to UNE switching whenever the “necessary” and “impair” requirements of Section 251(d)(2) are met. Rather, the law compels the FCC to provide opportunities for all telecommunications carriers to prove their need for access to a UNE Switching.

Americatel is not arguing herein that every non-rural ILEC must offer UNE Switching to every CLEC at every end office, in every exchange, and under all circumstances. There may well be many situations where a specific CLEC’s request to access UNE Switching from a specific ILEC in a specific exchange would not satisfy the “necessary” and “impair” standards set forth in the statute. In those instances, there should be no mandatory access to UNE Switching under the standards of the applicable law, as interpreted by the *USTA* case.<sup>7</sup> Yet, where a CLEC can demonstrate that access to UNE Switching is necessary to the CLEC’s provision of service and that lack of access thereto would impair that CLEC’s ability to provide such service, access should and, indeed, must be provided.<sup>8</sup>

Americatel’s position is fully consistent with the views of the Supreme Court in the *Iowa Utilities Board* case.<sup>9</sup> As all in the industry are well aware, the Supreme Court reversed the FCC’s former rule on access to UNEs because the rule failed to place any limits on a CLEC’s access to UNEs, in contravention of the statute. The former rule, in the view of the Court, permitted CLECs, “rather than the Commission, to determine whether access to ... elements is necessary, and whether the failure to obtain access to ... elements would impair the [CLEC’s] ability to provide services.”<sup>10</sup> Americatel’s proposal does not permit a CLEC to decide unilaterally what UNEs must be available. That decision would be left to the Commission.<sup>11</sup>

<sup>7</sup> *USTA*, 290 F.3d at 422-24.

<sup>8</sup> For example, for a CLEC to compete effectively with a BOC, the CLEC may be required to offer a larger local calling area to customers than the BOC offers. That strategy, in turn, might require the CLEC to offer service in the fringe areas of a large metropolitan community, which are served by the BOC, but not included in the metropolitan calling area. Within the metropolitan area’s core, alternatives to the BOC’s Switching UNE might be readily available, while market impairment might occur in the fringe areas in the absence of access to the UNE Switching from the BOC.

<sup>9</sup> *AT&T Communications, Inc. v. Iowa Utilities Board*, 525 U.S. 366 (1999).

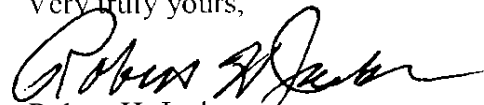
<sup>10</sup> *Id.*, 525 U.S. at 389.

<sup>11</sup> As an alternative, the FCC might want to consider adding a provision to its rules that states a CLEC is free to seek access from the appropriate state public utilities commission (“PUC”) to any network

Likewise, Americatele's position is fully consistent with the *USTA* case. **As** the Commission is cognizant, the Court of Appeals remanded the FCC's UNE rules, effectively, for their overly broad application. The Commission devised UNE rules of nationwide application based on a compilation of facts and data on a macro level. The Court found this approach to be unacceptable because it ignored differences in the level of market impairment from market-to-market. **A** more granular approach, such as the one being suggested by Americatele herein, is required to satisfy the dictates of the statute.

Both the Commission and the industry have seen that the road to vigorous local competition is a more winding and difficult path than were the roads in the long distance and wireless competition. Industry and Commission data indicate that there is a level of local competition in many areas of the United States. However, it is equally clear that consumers have not seen the significant price cuts for local service that they have seen in the long distance and wireless markets. Accordingly, it is critical that the FCC not yield to those who would eliminate access to UNE Switching and CINE-Ps chiefly to protect their retail revenues. The law makes it clear that competitive carriers are entitled to access UNE Switching wherever the "necessary" and "impair" tests are met. Americatele urges the Commission to protect that right, which would, in turn, ease the travel on the road to vigorous local competition and lower prices for consumers.

Very truly yours,



Robert H. Jackson  
Counsel for Americatele Corporation

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element unbundled at any technically feasible point, so long as the "necessary" and "impair" requirements are satisfied.